UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

NAPLETON 1050, INC. D/B/A NAPLETON CADILLAC OF LIBERTYVILLE

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

and

WILLIAM GLEN RUSSELL II, An Individual

Cases 13-CA-187272
13-CA-196991
13-CA-204377

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

Respectfully Submitted:

/s/ Emily O'Neill

Emily O'Neill
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 S. Dearborn, Suite 808
Chicago, Illinois 60604

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Board Cases

Federal Cases

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel submits this Brief in Support of Limited Exceptions to the April 4, 2018 Decision and Order of the Administrative Law Judge in the above-captioned matter.

I. INTRODUCTION

On April 4, 2018, Administrative Law Judge David I. Goldman ("ALJ") properly decided that Napleton Cadillac of Libertyville ("Respondent") violated Section 8(a)(3) and (1) of the Act when it severed the employment of two of its long-term journeymen mechanics, William Russell and David Geisler, in retaliation for its service employees' decision to select the Union as their collective-bargaining representative. ALJD p. 31, lines 23-29. The ALJ also properly found that Respondent violated Section 8(a)(1) of the Act when it informed Mr. Geisler that the reason for his layoff was due to the employees' decision to unionize; created the impression of surveillance of its employees' union activity; ordered the removal of striking employees' toolboxes from its facility and forcibly removed the tools in retaliation for the employees' decision to engage in a strike; and threatened employees with job loss for engaging in a strike. ALJD p. 31, lines 31-44.

Counsel for the General Counsel ("General Counsel") excepts only to limited portions of the ALJ's Decision and Order, specifically: (1) the ALJ's decision not to issue a ruling on Respondent's failure to bargain over the layoff of David Geisler in violation of Section 8(a)(5) and (1); (2) the failure to find that Respondent violated Section 8(a)(5) and (1) when it failed to furnish the Union with information relevant to Geisler's layoff; (3) to portions of the ALJ's decision mistakenly indicating that Respondent notified the Union of its decision to conduct a layoff on October 24, 2016, rather than October 26, 2016; (4) the ALJ's failure to fully remedy Respondent's unlawful acts of ordering its employees to remove their toolboxes from its facility and moving such toolboxes to the service driveway of its facility by deferring remedial action to

the Board and (5) to the ALJ's inadvertent omission of his specific finding that Respondent's removal of striking employees' toolboxes on August 3, 2016 (in addition to Respondent's ordering the removal), was unlawful in paragraph 6 of the ALJ's Conclusions of Law and in his Notice to Employees.

II. THE JUDGE ERRED IN DECLINING TO RULE ON RESPONDENT'S FAILURE TO PROVIDE THE UNION NOTICE AND OPPORTUNITY TO BARGAIN OVER THE LAYOFF OF DAVID GEISLER AND IN FAILING TO FIND THAT RESPONDENT FAILED TO PROVIDE INFORMATION RELEVANT TO THE LAYOFF (GC EXCEPTIONS 1-3)

A. The ALJ's Findings Relating to Respondent's Failure to Provide Relevant Information and Notice and Opportunity to Bargain Over David Geisler's Layoff

On October 18, 2016, Respondent's service employees ("mechanics" or "employees") voted in favor of union representation. ALJD p. 1. The following week, on October 27, Respondent retaliated against its employees for their decision to unionize by discharging William Russell and laying off David Geisler, two longtime journeyman mechanics, in violation of Section 8(a)(3) and (1). ALJD p. 22, lines 6-8; p. 24, lines 12-15.

The decision to lay-off Geisler was made by Respondent on October 21, 2016, and was communicated to its attorney on the same day. ALJD p. 13, lines 43. However, it was not until October 26, that Respondent, through its attorney, notified the Union of its layoff decision—well after the decision had already been made and less than 24 hours before it was executed. ALJD p. 9, lines 27-28; p. 10, lines 48-49.

On that day, October 26, Respondent's attorney James Hendricks called Union Business Representative Bob Lessmann and informed him that Respondent had decided to lay-off a

mechanic.[1] ALJD p. 9, lines 30-31. Hendricks stated that while he did not know the name of the mechanic at that time, Respondent would be laying off its least productive mechanic. ALJD p. 9, lines 31-32. Notwithstanding Hendricks's clear representation that the decision had already been made, Lessmann expressed his opposition to Respondent's use of productivity as the basis of the layoff, rather than seniority, to which Hendricks summarily responded, "no, I want it by productivity." ALJD p. 9, lines 35-36. Lessmann then requested documentation that Respondent was relying upon to assess productivity. ALJD p. 9, lines 33-40. That same day, Hendricks forwarded Lessmann information that he had received from Respondent's CFO Michael Jopes concerning productivity. ALJD p. 10, lines 1-2; GC Exh. 10.

Upon reviewing the documents that Hendricks sent, Lessmann determined that there was insufficient information upon which to assess Respondent's claimed productivity issues. Tr. 116. Accordingly, the following morning, on October 27, Lessmann sent an email to Hendricks, stating that the information he received was inadequate and reiterated the Union's proposal that the layoff be conducted by seniority. ALJD p. 10, lines 9-30; GC Exh. 10. Lessmann also requested that the mechanic selected for layoff be given recall rights. Id. The same day, notwithstanding Lessmann's attempts to negotiate over Respondent's layoff decision, and without further discussion or provision of information, Hendricks simply responded that the decision had already been made. ALJD p. 10, lines 32-34. Geisler was laid-off that very same

[1] The General Counsel excepts to the following portions of the ALJ's decision in which he incorrectly states that Hendricks notified Lessmann of the layoff decision on October 24, rather than on October 26, 2016: ALJD p. 13, lines 33-34; p. 22, lines 40-41. The error appears inadvertent, as evidenced by the ALJ's earlier factual findings that the phone call in question occurred on October 26, 2018. See ALJD p. 9, lines 27-28; p. 10, lines 1-2; see also Tr. 111:4-10, 112:5-14; GC Exh. 10. It appears that the ALJ mistakenly conflated an October 24, 2018 email from Respondent's CFO Michael Jopes to Hendricks, which was subsequently forwarded to Lessmann after their conversation on October 26. See GC Exh. 10, p. 2.

day, October 27, just a day after Respondent first notified the Union of its decision. ALJD p. 10, lines 48-49.

B. Legal Analysis

It is well-settled that when employees become represented by a collective-bargaining agent, their employer may no longer make unilateral changes in wages, hours, and terms and conditions of employment as it was privileged to do before they became represented. *NLRB v. Katz*, 369 U.S. 736 (1962). Thus, Section 8(a)(5) of the Act obligates an employer that is contemplating any such changes to notify the bargaining agent of the proposed changes and afford it an opportunity to bargain over the proposal. Id. at 743; *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964). This obligation to provide notice and an opportunity to bargain commences as of the date of the election, not on the date of certification. *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). One of the many mandatory subjects of bargaining which falls under this rule is the layoff of employees. *Adair Standish Corp.*, 292 NLRB 890, 890 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990). Likewise, Section 8(a)(5) obligates an employer to provide relevant information requested by a union following a Board election, even though the request is made prior to certification. *Alta Vista Regional Hospital*, 357 NLRB 326, 327 (2011), enfd. 697 F.3d 1181 (D.C. Cir. 2012).

To be considered timely in satisfaction of Section 8(a)(5), an employer's notice of proposed changes must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). If the notice is given too short a time before implementation, or if the employer has no intention of changing its mind, then the

notice is merely informational about a fait accompli and, accordingly, fails to satisfy the requirements of the Act. *Gannett Co.*, 333 NLRB 355 (2001) (citing *Ciba-Geigy Pharmaceutical Division*, supra). Significantly, the Board finds that an employer has presented its proposed changes as a fait accompli when the announcement or notification is presented as a final decision, or if the union was not afforded an opportunity to bargain. See, e.g., *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001) (fait accompli where employer presented changes as a final decision to be implemented and ignored the union's request to bargain); *Ciba-Geigy Pharmaceuticals*, supra (finding fait accompli where "the employer has no intention of changing its mind").

Notwithstanding finding all of the elements of a fait accompli present, the ALJ declined to reach the General Counsel's allegation that Respondent violated Section 8(a)(5) by failing to bargain over Geisler's layoff, deeming it "unnecessary" in light of his finding that the layoff itself violated Section 8(a)(3) and associated recommended make-whole remedy. ALJD p. 25, lines 12-16. The General Counsel respectfully excepts from the implication that a make-whole remedy pursuant to an 8(a)(3) violation is sufficient to effectuate the Act where Respondent's, independent, albeit related, conduct has occurred in violation of Section 8(a)(5).

As the Supreme Court has recognized, the Board's authority to issue cease and desist orders carries a significant deterrent against future violations under the Act. *Hoffman Plastic Compounds, Inc.*, 535 U.S. 137, 152 (2002). Likewise, the requirement of a conspicuously-posted notice to employees setting forth their rights under the Act and detailing an employer's unfair labor practices is one of the few tools in the Board's "remedial arsenal" and, therefore, its significance cannot be overstated, particularly in a newly-organized facility, as here, where employees are most likely to be unfamiliar with their employer's obligations under the Act. Id. Both the cease and desist order and the attendant Notice posting are, accordingly, critical to

effectuate national labor policy. Therefore, the General Counsel respectfully requests that, for the reasons detailed below, the Board find that Respondent violated Section 8(a)(5) when it failed to provide the Union with notice and opportunity to bargain over Geisler's layoff and issue an appropriate cease and desist order. See, e.g., *D & S Leasing*, 299 NLRB 658, 659–60 (1990) (in addition to finding layoff of 33 employees unlawful under 8(a)(3), also finding the employer's failure to bargain and provide information related to the layoffs unlawful), enfd. sub. nom. *NLRB v. Centra, Inc.*, 954 F.2d 366 (6th Cir. 1992), cert. denied 513 U.S. 983 (1994).

As the ALJ properly found, the uncontroverted evidence reveals that by the time Hendricks notified Lessmann about Respondent's plan to lay-off a mechanic on October 26, 2018, the decision had already been made as of October 21, just three days after the union election and the commencement of Respondent's 8(a)(5) bargaining obligations. ALJD p. 13, lines 40-43; p. 24, lines 1-10. Indeed, the record is devoid of any evidence suggesting that the layoff plan was at all tentative. To the contrary, Lessmann's perception that the purpose of Hendricks's communications was simply to provide notice of a final decision that left no room for discussion was confirmed both when Lessmann's repeated efforts to negotiate the terms of the layoff, including the criteria and recall rights, proved to be futile, and when Respondent implemented the decision just 24 hours after their initial call. ALJD p. 10, lines 36-49. Most notably, Hendricks himself admitted that he had no intention of bargaining over the layoff, testifying that there was no point in doing so issue because he knew the Union would not move away from its position that layoffs be conducted by seniority. Tr. 481-82. However, Respondent did not even provide the Union with an opportunity to try to reach a middle ground;

significantly, Hendricks never even responded to Lessmann's request that Geisler be given recall rights—a potential area of compromise.[2] GC Exh. 10.

This case is factually identical to *McClain E-Z Pack, Inc.*, 342 NLRB 337, 342 (2004), where the Board found that the employer's communication of a "heads up" regarding a layoff that would occur less than 24 hours later constituted an announcement of a fait accompli. As there, the absence of any intention on Respondent's part to alter its decision to lay-off Geisler, thereby denying the Union sufficient notice or opportunity to bargain over the decision or the effects thereof, was a clear violation of Section 8(a)(5) and (1) of the Act. Id.; *Davis Electric Wallingford Corp.*, 318 NLRB 375, 376 (1995); *Farina Corp.*, 310 NLRB 318, 320–21 (1993); *D & S Leasing*, supra at 659–60.

The foregoing also shows that the ALJ erred in failing to find that Respondent violated Section 8(a)(5) by failing to provide the Union with information relevant to its decision to lay-off Geisler. In dismissing the allegation, the ALJ relied on the following emailed response from Lessmann to Hendricks's partial provision of information in response to Lessmann's October 26 request for information relied upon by Respondent in making its layoff decision:

> Jim, I received the documents you sent, thank you. Since we can not [sic] determine, just by looking at the numbers booked, if there are issues with work distribution, amount of training each technician has or lack thereof, what Classification each technician is . . . I would suggest that for purposes of layoff, that you use the pure seniority of the technicians by which classification the Employer believes the employee is in at this time. (This too also needs to be negotiated.)

[2] Given Hendricks's characterization of the issue being one that the parties could never agree on, it is relevant and notable that the parties have since agreed to conduct future layoffs according to seniority. Tr. 483.

ALJD p. 25, lines 24-36. In finding that this statement did not constitute a request for additional information, the ALJ also relied on Lessmann's testimony that, notwithstanding his view that the information that had been provided was insufficient, he did not request additional information because he "knew [they] were setting up for negotiations." The ALJ's narrow examination of the evidence ignores the broader context of the Union's initial request, Respondent's duty under Section 8(a)(5), and its breach of that duty when it failed to fully comply with the Union's request.

An employer's obligation to furnish, on request, information needed by a bargaining agent for the performance of its statutory duties encompasses not only the provision of information in its possession, but also information not in its possession or control but to which it has access. *Garcia Trucking Service*, 342 NLRB 764, 764 n. 1 (2004); *United Graphics, Inc.*, 281 NLRB 463, 466 (1986). In this case, Respondent only provided a portion of the information it had in its possession and which it had relied upon in making its layoff decision. This is evidenced by the testimony of Respondent's Corporate Fixed Operations Director Tony Renello, who stated that in deciding whether and whom to lay-off, in addition to the spreadsheet provided to Lessmann (GC Exh. 10), Respondent also examined an additional set of productivity spreadsheets and "DMS" reports containing additional information, neither of which were provided to the Union. ALJD p. 13, n. 13; Tr. 299. This information was plainly relevant to Lessmann's request for information that would assist the Union in evaluating Respondent's layoff decision—both the reason for the decision and the criteria relied upon in selecting Geisler. See *Hofstra University*, 324 NLRB 557, 557 (1997) (information dealing directly with bargaining unit employees is presumptively relevant). That it was not in Hendricks's possession

at the time of Lessmann's request is irrelevant.[3] In any event, it would have been easy for Hendricks to attain this information, as it was clearly in Respondent's possession at the time, having been relied upon make the October 21 decision.[4] Thus, Hendricks's failure to produce this additional information rendered his partial response to the Union's information request incomplete and, accordingly, inadequate under Section 8(a)(5).[5] See *Stecher's Supermarket*, 264 NLRB 761, 762-63 (1983) (incomplete provision of information violative of Section 8(a)(5)).

The ALJ erred in failing to find a violation simply because Lessmann *subsequently* failed to respond to Hendricks's incomplete response with an additional follow-up request. For one, the Union's request had already been made and only partially responded to, without any explanation from Hendricks as to why or without assurance that additional information was forthcoming. Second, Lessmann's October 27 reply made it clear that the information he had been provided was inadequate and made it impossible for the Union to effectively bargain over the decision. Finally, it was obvious from Hendricks's communications that it would be futile for the Union push for more information—the layoff decision had already been made and, therefore, no amount of information could have placed the Union in the position to sway

[3] Likewise, any argument that Lessmann's request was limited to documents that "he" (Hendricks) personally had in his possession and, therefore, that the request was satisfied when Hendricks forwarded him the documents he had received from Jopes must be rejected. This argument fails as an overly literal reading of the Union's request and because it takes a fatally narrow view of Respondent's obligations under the Act. It was patently obvious that Lessmann was requesting any documents related to and relied upon by Respondent in making its layoff decision in order to prepare to negotiate the decision, documents which Hendricks would not necessarily have in his personal possession but which, of course, he had access to and a duty to obtain inasmuch as they were responsive to the Union's request. Accord *United Graphics*, supra.

[4] Or, if the information no longer was in its possession, Respondent was obligated to provide an explanation as to why. *Garcia Trucking Service*, supra at 764 n. 1

[5] Nor, at any point, did Respondent explain why it was producing only a portion of the information, or otherwise claim that the Union's information request was irrelevant, confidential, would unduly burden the Respondent to produce, or did not exist. Respondent simply failed to produce a complete response, thereby unequivocally violating Section 8(a)(5).

Respondent. See *D & S Leasing*, supra at 659–60; *McClain E-Z Pack, Inc.*, supra at 342. Thus, it was error for the ALJ to examine Lessmann's October 27 emailed response in isolation because what the Union did or failed to do after Respondent failed to comprehensively respond to the Union's information request has no bearing on whether the Respondent violated the Act in the first instance. See *Farina Corp.*, supra at 320–21 (1993).

III. THE ALJ'S FAILURE TO ORDER CONSEQUENTIAL DAMAGES RESULTING FROM RESPONDENT'S UNLAWFUL ORDERING REMOVAL OF STRIKING EMPLOYEES' TOOLBOXES FROM ITS FACILITY AND ITS REMOVAL OF SUCH TOOLBOXES (GC EXCEPTIONS 4 AND 5)

A. The ALJ's Findings Related to Respondent's Unlawful Ordering of the Striking Mechanics to Remove their Tools and Its Removal of Such Toolboxes from its Facility

Respondent and the Union began first-contract negotiations in December 2016. ALJD p. 14, lines 4-6. When, eight months later, negotiations had stalled, the mechanics decided that their best course of action was to go on strike on August 1, 2017. Id.; ALJD p. 14, lines 31-32. The strike coincided with an area-wide strike against other dealerships that were members of a multi-employer bargaining association, and of which Respondent was aware.[6] Indeed, Respondent had planned to use the area-wide strike as an opportunity to funnel business from the struck dealerships to its Napleton Cadillac of Libertyville dealership. ALJD p. 14, lines 14-23. Thus, on July 31, Respondent held a meeting with the mechanics to inform them that the area-wide strike provided them the opportunity to make a lot of money by working overtime to handle the overflow of business from the struck dealerships and that Respondent would feed them steaks and allow them to work as many hours as they wished. Id. By all appearances, the mechanics were on board with the plan. ALJD p. 14, lines 25-29.

[6] Respondent Napleton Cadillac of Libertyville, the dealership involved here, was not a member of the association, but its umbrella group, Napleton, owned about six other dealerships that were and which were struck at this time. ALJD p. 14, lines 8-12.

Thus, when the mechanics decided to strike on August 1 instead, it caught Respondent off guard, prompting it to take swift and vindictive action. ALJD p. 14, lines 31-32. On the very first day of the strike, Respondent distributed a letter to its mechanics which, among other things, instructed them to remove their toolboxes from the facility.[7] Because the toolboxes are large, metal cabinets weighing thousands of pounds and require a tow truck to be moved, Respondent's attorney agreed to give the Union until the end of that week—August 4—to make arrangements to have all of the toolboxes moved. ALJD p. 31, lines1-5; p. 26, lines 30-32. Yet, notwithstanding this agreement, early on August 3, Respondent summarily and without prior warning, took matters into its own hands by rolling each of the mechanic's toolbox—each containing a career's worth of valuable tools—outside the fenced-in area of its facility onto its driveway, where they were left uncovered and unattended. ALJD p. 15, lines 40. Thereafter, there was a torrential downpour. ALJD p. 16, lines 7-14. Although some of the toolboxes were moved back inside the facility in time to avoid damage, the toolboxes and contents belonging to at least two mechanics—Bill Oberg and Joseph Schubkegel—sustained significant water damage. Id. The following morning, August 4, the Union and mechanics arranged for a towing service to remove each of their toolboxes from Respondent's facility. ALJD p. 16, lines 16-17.

The ALJ properly found that Respondent's insistence on removing the toolboxes was in retaliation for the mechanics' exercising their protected right to strike, as alleged in paragraph V(e) of the Complaint. ALJD p. 26, lines 36-38. Indeed, as the ALJ found, Corporate Fixed Operations Director Renello admitted as much when he testified that the only reason for ordering the toolboxes removed from the facility was precisely because the mechanics had elected to strike. ALJD p. 26, lines 44-45; p. 27, lines 6-15. This admission is entirely consistent, of

[7] The letter also contained unlawful threats of job loss, as found by the ALJ. ALJD p. 30, line 32.

course, with Respondent's failure to provide even a scintilla of credible evidence that would so much as hint at a legitimate business justification for having the tools removed at all, let alone forcibly by its own actions on August 3, a day before the agreed-upon date. ALJD p. 27, lines 17-18. The ALJD properly dismissed all of Respondent's proffered justifications as implausible pretextual fabrications. ALJD, pg. 27, line 18 – p. 28, line 13.

Yet, despite his finding that Respondent's ordering of removal and its actual removal of the mechanics' toolboxes unlawful,[8] the ALJ deferred to the Board to fully remedy the violation by awarding appropriate consequential damages. ALJD p. 32, line 45 – p. 33, line 11.

B. Legal Analysis

The General Counsel respectfully urges the Board to issue a specific make-whole remedial order in this case, to require Respondent to compensate its employees for all consequential economic harms they sustained as a result of Respondent's unfair labor practice of ordering that they remove their toolboxes from its facility and by removing such toolboxes on August 3. Specifically, Respondent should be required to (1) reimburse Bill Oberg and Joseph

[8] Notwithstanding the narrow language used in paragraph 6 of the ALJ's Conclusions of Law, "On or about August 1, 2017, and thereafter, the Respondent violated Section 8(a)(1) of the Act by ordering the removal of striking employees' toolboxes from the Respondent's facility in retaliation for the employees' engaging in a strike and to discourage the employees from engaging in this and other protected and concerted activities," the ALJ's decision, read in its entirety, makes clear that he found both the ordering of the toolboxes removed and the actual removal on August 3 unlawful. First, on page 26, the ALJ states, "the complaint alleges (paragraph V(e)) that the Respondent's removal of toolboxes from the premises during the strike was in retaliation for the employees commencing a strike and to discourage this activity. . . . I agree that the requirement that the toolboxes be removed violated the Act." Lines 7-9; 36-38. Second, paragraph 1(d) of the ALJ's recommended Order requires Respondent to cease and desist from "Ordering the removal of and/or removing employee toolboxes or other employee property from the Respondent's facility in retaliation for the employees engaging in a strike or other protected and concerted activities." The General Counsel excepts to the ALJ's inadvertent omission of Respondent's August 3 act of removing the toolboxes to its driveway from paragraph 6 of his Conclusions of Law and requests the Board to amend that paragraph and the corresponding remedial Notice paragraph accordingly.

Schubkegel for the damage incurred to their toolboxes and tools on August 3 after Respondent rolled them outside where they were exposed to the elements, and (2) reimburse all of the mechanics for the towing expenses they incurred when they arranged to have their toolboxes removed from Respondent's facility on August 4 pursuant to orders contained in Respondent's August 1 letter.

Reimbursement for this consequential economic harm is well within the Board's remedial power. The primary focus of the Board's remedial structure is to restore, as nearly as possible, the status quo ante by restructuring the circumstances that would have existed had there been no unfair labor practices. *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In other words, to "make whole" employees discriminated against for exercising their Section 7 rights. See, e.g., *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). As the Supreme Court has recognized, making employees who for losses suffered on account of unfair labor practices is of paramount importance in the vindication of the public policy that the Board is tasked to enforce. See generally *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1994); *Phelps Dodge Corp. v. NLRB*, supra at 197. Thus, Board orders should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, supra at 194; see also *J.H. Rutter-Rex Mfg.*, 396 U.S. 258, 263 (1969) (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company's" unlawful act). In this respect, the Supreme Court has repeatedly affirmed the Board's broad discretionary authority under Section 10(c) to fashion appropriate remedies to undo the effects of unlawful conduct. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *Virginia Electric & Power Co. v. NLRB*, supra; see also *WestPac Electric, Inc.*, 321 NLRB 1322, 1322

(1996) (ordering make-whole relief even in the absence of exceptions to the ALJ's failure to do so).

Indeed, in *Phelps Dodge Corp. v. NLRB*, supra at 198, the Supreme Court approvingly observed that the Board has striven to "attain just results in diverse, complicated situations" to effectuate the purposes of the Act. Thus, the Court has emphasized that the Board's "make whole" remedial power is not limited to backpay and reinstatement. *Virginia Electric & Power Co. v. NLRB*, supra at 539. Rather, the Court has stated that in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). For example, if an employee suffers an economic loss as a result of unlawful discrimination that is distinct from backpay, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses.

In this case, compensation for damages resulting from Respondent moving Oberg's and Schubkegel's toolboxes outside and unattended is appropriate and, contrary to the ALJ's mistaken assertion, not a matter of first impression. To the contrary, the Board has exercised its remedial authority to order reimbursement for personal property damage resulting from an employer's unlawful conduct. In *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993), for example, the Board held that a discriminatee was entitled to reimbursement for clothing that was ruined when she was unlawfully assigned to the more onerous task of cleaning dirty pits. Similarly here, the Board's established remedial objective of returning parties to the lawful status quo ante requires that Oberg and Schubkegel be made whole for the damage to their toolboxes and tools that was a direct consequence of Respondent's unlawful removal of the toolboxes from inside its facility. There can be no dispute that, but for Respondent's unlawful action of pushing the toolboxes outside where they were rained upon in retaliation for the employees exercising

their right to strike, damage to the toolboxes and their contents would not have occurred, and the employees would not have had to incur the cost of repairing and/or replacing the tools. Likewise, but for Respondent's unlawful insistence that all of the striking mechanics remove their tools from its facility, they would not have incurred the cost associated with hiring a tow service to do so on August 4. ALJD p. 16, lines 16-17; p. 31, lines 1-5. Accordingly, reimbursement for such towing costs is also required to make those employees whole for Respondent's unlawful discrimination.

The cases cited by the ALJ involving the Board's rejection of employers' application for property damages arising from union misconduct (ALJD p. 33, n. 32) are inapposite. The basic purpose and primary focus of the Board's remedial power is to make *employees* whole for losses suffered on account of *discrimination*. *Phelps Dodge Corp. v. NLRB*, supra at 194; *see also J.H. Rutter-Rex Mfg.*, supra at 263 (recognizing the Act's "general purpose of making [] *employees* whole). Thus, in remedying unfair labor practices, the Board is primarily concerned with public rights, deterring future violations, and making whole *individual discriminatees*. See *Big Three Industrial Gas & Equipment*, 263 NLRB 1189, 1190 (1982), overruled on other grounds in *American Navigation Co.*, 268 NLRB 426, 427 (1983). In consideration of the Board's primary concern with protecting individuals who are the victims of discrimination for exercising their Section 7 rights, the Board's refusal to expand its remedial "make whole" authority to entities, including employers and unions, is of no consequence here.

Similarly, the Board should reject any implication that it is not equipped to handle property damage claims. In this respect, the Supreme Court has specifically cautioned the Board against "overestimate[ing] administrative difficulties and underestimate[ing] its administrative resourcefulness in making workers whole." See *Phelps Dodge Corp. v. NLRB*, supra at 198. The damages here are easily determined, either through receipts for the cost of replacing the

tools or having them towed, or through third party estimates of the amount of damages. The General Counsel urges the Board to heed the Court's directive to "avail[] itself of the freedom given it by Congress to attain just results in" these circumstances by ordering Respondent to reimburse Oberg and Schubkegel for the damage to their toolboxes and tools and to reimburse all of the striking mechanics for the costs incurred when they hired a tow to move their toolboxes on August 4 pursuant to Respondent's unlawful orders.

IV. CONCLUSION AND REMEDY

Based upon the foregoing, Counsel for the General Counsel respectfully requests that the Board sustain the General Counsel's Limited Exceptions to the Administrative Law Judge's Decision and modify the ALJ's recommended Conclusions of Law, Order and Notice accordingly.

Dated: May 1, 2018 at Chicago, IL

Respectfully Submitted,

/s/ Emily O'Neill
Emily O'Neill
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 South Dearborn St., Ste. 808
Chicago, IL 60604

AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

I, the undersigned employee of the National Labor Relations Board, affirm that on May 1, 2018, I served the above-entitled document(s) by **electronic mail,** as noted below, upon the following persons, addressed to them at the following addresses:

James F. Hendricks Jr., Partner — **E-MAIL**
Freeborn & Peters LLP
311 S Wacker Dr Ste 3000
Chicago, IL 60606-6679
jhendricks@freeborn.com

Michael P. MacHarg , Attorney — **E-MAIL**
Freeborn & Peters LLP
311 S Wacker Dr Ste 3000
Chicago, IL 60606-6679
MacHarg, Michael P.
mmacharg@freeborn.com

Robert J. Kartholl — **E-MAIL**
Law Offices Of Robert J. Kartholl
9 East Irving Park Road
Roselle, IL 60172-2017
kartholl@hotmail.com

Rick Mickschl, Grand Lodge Representative — **E-MAIL**
Local Lodge 701, International Association
of Machinists and Aerospace Workers
113 Republic Avenue, Suite 100
Joliet, IL 60435-3279
rmickschl@iamaw.org

Brandon M. Anderson, Attorney — **E-MAIL**
Jacobs Burns Orlove & Hernandez
150 N Michigan Avenue, Suite 1000
Chicago, IL 60601-7569
banderson@jbosh.com

May 1, 2018
Date

/s/ Emily O'Neill
Signature